IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SUMMONS FOR JUDGMENT NO.588 OF 2004
IN
SUMMARY SUIT NO.57 OF 2004

M/s.Industrial Flooring ..Plaintiffs

Vs.

M/s.Indiana Conveyors P.Ltd. ..Defendants

Mr.J.P.Sen i/b Fed. & Rashmikant for the plaintiffs

Mr.Shyam Diwan a/w A.Panickar i/b Khaitan and Jaikar for the defendants

CORAM : S.U.KAMDAR, J
DATED : 14TH SEPTEMBER, 2005

P.C.:

1. The present suit is filed in respect of contract placed by the defendants with the plaintiffs. The said contract is at Ex.P to the plaint for Rs.10,65,000/-. Under the terms and conditions of the said contract defendant has given contract for supply of the material and labour work for providing application for epoxy screeding and epoxy coating to be used for RCC structure. The said contract is for Rs.10,65,000/-. There are various terms and conditions to the said contract

which are set out in annexure II at page 58 to 60 of the plaint. In respect of the said contract there has been balance amount due and payable by the defendants to the plaintiffs being sum of Rs.6,76,514/- with interest thereon totalling to Rs. 10,31,683.85.

2. The defendant has resisted the said claim. It has been interalia contended firstly that one company known as Atul Ltd is necessary and proper party in the present suit and in absence of such necessary and proper party in the suit the present suit is not maintainable and unconditional leave to defend should be granted. In so far as the aforesaid defence is concerned, I find from the Purchase Order which is annexed at Ex.P to the plaint that there is a direct contract between the plaintiff and the defendant. Atul Ltd. is not party to the said contract and therefore, In my opinion, Atul Ltd is neither necessary party nor proper party to the present suit.

2. Apart therefrom, the entire argument of the necessary and proper party is based on a footing

that originally there was one single contract proposed to be given to Atul Ltd. However, on the request of Atul Ltd contract was spilt in two parts because Atul Ltd refused to undertake the work of providing epoxy coating and epoxy screeding. It is the case of the defendants that the plaintiffs have been recommended by Atul Ltd and in support thereof various correspondence have been shown to me by the defendants. Merely because the plaintiff is recommended by Atul Ltd and that Atul Ltd was carrying on remaining work under a separate contract which was originally proposed to be a part of one single contract it does not mean that either Atul Ltd is a necessary and/or proper party to the suit and/or a certification is required to be issued by Atul Ltd for the purpose of making payment to the plaintiffs herein.

3. The next contention advanced by the learned counsel for the defendants is that there are correspondence which are suppressed by the plaintiffs and produced by the defendants in their affidavit in reply. I have perused the said correspondence. Basically the said correspondence

pertains to pre contract stage which was initiated by and between the plaintiff and the Atul Ltd.as a single contract. There are also correspondence raising various disputes with the Atul Ltd. In my opinion, once there is separate contract executed by the defendant in favour of the plaintiff then the question of looking into the pre-contract stage correspondence and the correspondence with Atul Ltd in respect of the dispute is irrelevant and is not material to the present suit. In that view of the matter, I do not accept the contention that there is material suppression by the defendant in the present suit.

4. The third contention raised by the plaintiff is that Atul Ltd is over paid and they are entitled to refund from Atul Ltd. I do not see how the same is relevant to the case of the plaintiff herein. Plaintiff has separate Purchase Order and plaintiff is entitled to separate amount under the separate purchase order. The dispute between Atul Ltd and plaintiff cannot entitle the defendant to withhold the amount due and payable by the defendant to the plaintiff.

5. The contention raised by the learned counsel for the defendant by relying upon the minutes of meeting dt.3.3.00 in respect of payment terms is totally without any merits. The said minutes are between the plaintiff and the said Atul Ltd and the defendant is not party to the suit. Payment terms mentioned in clause 5 of the said minutes are also between Atul Ltd and defendant. However, the learned counsel for the defendant have tried to suggest that clause 5 of the terms and conditions of payment terms are also applicable to the plaintiff herein and the certification provided therein is also required in so far as work carried out by the plaintiff under separate purchase order is concerned.The learned counsel for the plaintiff has however drawn my attention to the part of annexure 2 to the said purchase order which is placed by the defendants with the plaintiffs which provides for payment of the terms under the said purchase order. The said payment terms reads as under

"Payment Terms:

90% payment against completion of the work within 30 days from the date receipt of site certification.

10% payment against submission of performance bank guarantee as per our format and completion of work within 30 days."

6. The said payment terms does not require any certification by the defendant from Atul Ltd and thus I do not find any substance in the aforesaid contention. However, with a view to give an opportunity to the defendants to defend the case, I direct the defendant to deposit a sum of 6.0 lacs within 4 weeks. failing which the plaintiffs will be entitled to decree. If the said amount is deposited the Prothonotary and Senior Master is directed to invest the same in any Nationalised Bank in Fixed Deposit initially for a period of 3 years and then renew the same from time to time till further orders of this court. If the amount is deposited then suit is to be transferred to the list of Commercial Causes. Written Statement or points of defence to be filed within four weeks

from the date of deposit. Affidavits, list of documents to be filed within four weeks thereafter. Inspection within four weeks thereafter. Suit to be on board of the learned Judge taking Commercial Causes.